(2)

No. 94-1045

Supreme Court, U.S.
FILED
DEC 22 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
vs.
JOHN RAMBO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. PIERRY
Counsel of Record

PIERRY & MOORHEAD

301 North Avalon Boulevard
Wilmington, California 90744
(310) 834-2691
(213) 775-8348

Attorneys for Respondent
JOHN RAMBO

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

QUESTIONS PRESENTED

1. Must a party seeking a 33 U.S.C. § 922 Modification of an Award of Permanent Partial Disability prove that the Claimant has undergone a change in "physical condition"?

2. Should the employer's Application For Modification be denied because of the representations of its attorney to the injured worker that the award would be paid for life? (S. Ct. Rule 15.1)

PARTIES TO THE PROCEEDING

Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor (94-1045).

Respondent, John Rambo is an individual resident of Los Angeles, California.

Petitioner, Metropolitan Stevedore Company (94-820).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

PROCEDURE BEFORE THE SUPREME COURT 1

DISCUSSION 1

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Burley Welding Works, Inc. v. Lawson,
141 F.2d 1964 (5th Cir. 1944) 2

Fleetwood v. Newport Shipbuilding &
Dry Dock Co.,
776 F.2d 1225 (4th Cir. 1985) 3

General Dynamics Corp. v. Director,
Office of Workers' Compensation Programs,
U.S. Department of Labor,
673 F.2d 23 (1st Cir. 1982) 2

McCormick Steamship Co. v. United States
Employees' Compensation Comm'n,
64 F.2d 84 (9th Cir. 1933) 2

Statutes

33 U.S.C. § 922 2-4

No. 94-1045

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

JOHN RAMBO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

The Respondent, John Rambo, respectfully requests that this Court deny the Petition For Writ of Certiorari submitted by the Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor, seeking review of the Ninth Circuit's decision in this case.

PROCEDURE BEFORE THE SUPREME COURT

On November 5, 1994 Metropolitan Stevedore filed a Petition For Writ of Certiorari with the Clerk of the United States Supreme Court (94-820). On December 2, 1994, Rambo filed his reply to that Petition For Writ of Certiorari. On December 12, 1994, the 89th day after the Ninth Circuit denied Rehearing, the Director filed this Petition For Writ of Certiorari (94-1045).

DISCUSSION

The Reply Brief by Rambo that is already on file with this Court sets forth all of Respondent's authorities, precedent and argument. However, Rambo would like to make the following additional statement.

It cannot be denied that since 1933 the party moving for a 33 U.S.C. § 922 Modification has had the threshold burden of proving that there was a change in the injured worker's physical condition. Once that burden has been met, all other circumstances become relevant. Absent a showing of a change in the physical condition of the injured worker other circumstances are irrelevant. *McCormick Steamship Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933); *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 1964, 966 (5th Cir. 1944).

In 1985 the Director opined, and was able to convince two judges of the Fourth Circuit, that a 33 U.S.C., § 922 Modification was justified merely by showing an

increase in the injured worker's earnings. *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985). The corollary of the Director's position is that the injured worker is entitled to an upward modification of his award upon a showing of a decrease in his earnings. If this roller coaster approach is adopted every claim for compensation for a nonscheduled award will inspire multiple petitions by each party based upon changes in the business cycle and the inevitable claim by the injured worker for permanent total disability in the twilight years of the worker's earning life.

In support of the Director's position the Solicitor advances three arguments.

FIRST — Uniformity of the statutory scheme.

The only support for a legislative uniform scheme that the Solicitor offers is the termination of death benefits on the death or remarriage of a widow and termination of death benefits for a dependent child upon the child's reaching majority. This is at best a make weight argument. There is neither legislative history nor precedent to support this contention. Interestingly, the Solicitor fails to note that under the Director's scheme of § 922 Modifications for a nonscheduled injury, i.e. arms, legs, etc., the moving party will still be required to present medical evidence of a "change in physical condition." Whereas, in a Petition For Modification of a nonscheduled award, i.e. head, neck or back, the moving party only need show a change in the earnings of the injured worker. How does this comport with a uniform legislative scheme?

SECOND — Rehabilitation of the injured worker.

It must be pointed out that in both *Fleetwood*, *supra* and *Rambo*, *supra*, the moving party presented no evidence of rehabilitation. The only evidence present in

BOTH cases was an increase in the earnings of the injured worker. Indeed in Rambo the employer in its Petition for Modification stated:

> "In this case we [Petitioner] can clearly show simply by the earnings information *ALONE* . . ." Emphasis added, Appendix A3 of Respondent's Reply to the Employer's Petition For Writ of Certiorari.

THIRD — Deference due the opinion of the Director.

Fortunately in our system of government, the judicial branch is not required to render lock step allegiance to a plenipotentiary of the Executive Branch of our government, including the Director of the United States Department of Labor. It is respectfully submitted that in the face of Sixty years of precedent which has required a moving party in a 33 U.S.C. § 922 Modification Petition to show a change in physical condition, to substitute a never ending series of Petitions For Modification based solely upon the march of inflation, changes in the business cycle and the inevitable decline in earnings of the injured worker at the conclusion of his earning career is not only inappropriate, it is unwise. The Director's position in *Fleetwood* and in *Rambo* is misguided. The Ninth Circuit Court of Appeals corrected the Director in this case. It is respectfully submitted that the most efficient manner for this Court to again inform the Director of her mistake is simply — "Cert. Denied."

CONCLUSION

Therefore, Respondent prays that the Court deny the Director, Office of Workers' Compensation Programs, United States Department of Labor's Petition For Writ of Certiorari because this case presents no issue appropriate for the Court's review, and because the lower Court's holding was not in error.

DATED: December 21, 1994.

Respectfully submitted,

THOMAS J. PIERRY
Counsel of Record

PIERRY & MOORHEAD

Attorney for Respondent
JOHN RAMBO